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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 222

OTTO ROSE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 89-95) is not yet reported. The District Court rendered no opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 19, 1942 (R. 95). A petition for rehearing was denied on June 16, 1942 (R. 111). The petition for a writ of certiorari was filed on July 11, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code,

as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases. Cf. *Craig v. United States*, 298 U. S. 637.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in denying petitioner's motion for a bill of particulars.

2. Whether it was reversible error to admit into evidence certain exhibits including personal income tax returns of the petitioner for years other than those covered by the indictment.

3. Whether the sentence imposed upon petitioner is cruel and unusual.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 145. PENALTIES

* * * * *

(b) * * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

STATEMENT

On March 5, 1941, petitioner was indicted in the Western District of Oklahoma under two counts which charged that he willfully attempted to evade and defeat specified large portions of his income tax liability for the calendar years 1936 and 1937, respectively (R. 3-9). Petitioner was tried before a jury, was convicted upon both counts, and was sentenced to imprisonment for five years on each count, the sentences to run consecutively (R. 13-14). The judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit (R. 95) and a petition for rehearing was denied (R. 111).

The petition for writ of certiorari raises no question as to the sufficiency of the evidence to support the verdict and the record filed in this Court does not include a complete transcript of the proceedings at the trial. (See R. 111-112.) From those portions of the evidence which are included in the record (R. 29-86) and from the opinion of the court below (R. 89-95), it appears, however, that petitioner was Chairman of the Board of Education of Oklahoma City and that the Government proved that he failed to return as income specific amounts of money which he had received in the form of bribes for action by the Board of Education. It appears also that there was testimony that petitioner sought to induce a Government witness to give perjured testimony concerning a transaction in which he had paid petitioner a bribe (R. 91-92).

The issues raised by the petition herein relate to the validity of the action of the trial court in denying a motion for a bill of particulars filed by petitioner (R. 11) and in admitting certain evidence, and to the propriety of the sentence. The facts pertinent to these questions will be stated in the Argument.

ARGUMENT

1. The indictment charged that during the taxable years petitioner received income as follows (R. 4, 6):

1936		1937	
Fees-----	\$78. 00	Interest Received----	\$11. 25
Rents-----	4, 298. 85	Oil Royalties-----	8. 16
Royalties-----	51. 26	Rents-----	4, 408. 36
Other Income-----	7, 249. 36	Other Income-----	14, 458. 25
<hr/>		<hr/>	
Total-----	\$11, 678. 07	Total-----	\$18, 886. 02

It further charged that with intent to evade \$465.44 on his tax for 1936 and \$1,285.14 on his tax for 1937 he reported only the following income in his returns (R. 5, 7-8):

1936		1937	
Fees-----	\$78. 00	Royalties-----	\$8. 16
Royalties-----	51. 26	Rents-----	3, 809. 61
Rents-----	4, 367. 60	Capital Gains-----	975. 08
<hr/>		<hr/>	
Total-----	\$4, 497. 46	Total-----	\$4, 792. 85

By his motion for a bill of particulars, petitioner sought to have each of the items of income alleged to have been received by him broken down to show the particular source from which it was derived

(R. 9-10).¹ The trial court's denial of this motion is contended to be reversible error. The circuit court of appeals stated that a bill should have been furnished with respect to the items of "Other Income" to which the Government's proof alone related (R. 90), but held that petitioner suffered no substantial prejudice and that, therefore, the error was not ground for reversal. This conclusion is clearly correct and does not conflict with the decision in *Singer v. United States*, 58 F. (2d) 74 (C. C. A. 3), relied on by petitioner. See *Wong Tai v. United States*, 273 U. S. 77; *Dunlop v. United States*, 165 U. S. 486; *Rosen v. United States*, 161 U. S. 29.

As the court below pointed out in its opinion (R. 91-92), there were in the instant case circumstances indicating that petitioner knew or had reason to believe in advance of the trial that the items "Other Income" referred to moneys received by him as bribes for action by the Board of Education. And at no time during the trial did petitioner claim that he was surprised by the Government's evidence with respect to the bribes or seek to obtain a postponement in order to prepare his defense more fully. Nor does petitioner now allege or make any showing that he was prejudiced

¹ Petitioner also filed a demurrer to the indictment on the ground that the allegations of the items of "Other Income" were indefinite and uncertain (R. 10-11). The overruling (R. 11) of the demurrer is not now alleged as error.

by the denial of his motion for a bill of particulars. Accordingly, the facts are quite different from those in the *Singer* case, where the refusal of a bill of particulars was held to have been prejudicial.

The indictment in that case charged the taxpayer with various items of income including "Other income \$240,635.19." Most of this amount was eliminated at the trial, but the facts were confused and frequent interruptions were required to acquaint the defense with information to which it was entitled in advance. The appellate court concluded from all the circumstances that the taxpayer "could not properly prepare his defense, and was not in a position to keep from the jury the great mass of prejudicial evidence" which was introduced by the Government in support of its inaccurate general allegations. 58 F. (2d) at 76.

2. Petitioner contends (Pet. 3, 9, 16-18) that it was harmful error for the trial court to have admitted into evidence testimony of a collector of internal revenue concerning petitioner's tax returns for 1935 and 1938. The record indicates that the collector was called to the stand to identify the returns for those years and that the returns were admitted upon stipulation that they were authentic (R. 29). However, it does not show any testimony by the collector. Nor do the returns appear in the record filed herein. Moreover, since there is no question as to authenticity, the admis-

sion of the returns was proper as bearing upon petitioner's intent to evade taxes. *Lisansky v. United States*, 31 F. (2d) 846 (C. C. A. 4), certiorari denied, 279 U. S. 873.²

The exhibits introduced by the Government and set forth at pages 57-85 of the record are objected to as being incompetent, immaterial, and prejudicial (Pet. 18). No basis for these general objections is alleged or shown, however, and the exhibits properly were admitted as part of the proof of petitioner's income.

3. Petitioner contends that his sentence is harsh, cruel, and unusual. However, it is authorized by the statute (*supra*, p. 2) and there is no question of constitutionality. It was, therefore, within the power of the trial court to impose, and affirmance of it was proper.³

² *Singer v. United States*, *supra*; *Miller v. Territory of Oklahoma*, 149 Fed. 330 (C. C. A. 8); and *Coulston v. United States*, 51 F. (2d) 178 (C. C. A. 10), relied on by petitioner, do not involve the admission of tax returns or any comparable question and are not in conflict with the decision of the court below.

³ See *Freeman v. United States*, 243 Fed. 353 (C. C. A. 9), certiorari denied, 249 U. S. 600; *United States v. Porter*, 96 F. (2d) 773 (C. C. A. 7), certiorari denied, 305 U. S. 612; *Bogy v. United States*, 96 F. (2d) 734 (C. C. A. 6), affirming 16 Fed. Supp. 407 (W. D. Tenn.), certiorari denied, 305 U. S. 608; *Russell v. United States*, 119 F. (2d) 686 (C. C. A. 8); *Carpenter v. United States*, 280 Fed. 598 (C. C. A. 4).

CONCLUSION

The decision below is correct and there is no conflict. The petition should be denied.

Respectfully submitted,

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AUGUST 1942.